NO. 80-935

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FIRST NATIONAL BANK OF JACKSON,
Petitioner

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondent's arguments based upon the Federal Tort Claims Act (Br. in Opp. 3-4) and that the Bank[1] is seeking an "independent judgment for damages" (Br. in Opp. 5) are not responsive to the issues raised by the Petition. The Bank has abandoned these contentions and is seeking to diminish or defeat the relief available to Respondent on equitable grounds.

Respondent's "the end justifies the means" argument is predictable; its acceptance, however, by the Court of Appeals and other courts[2] is alarming. Implicit in Respondent's position is the concept that no deficiency in the statutory scheme of reasonable investigation and non-coercive conciliation can affect the EEOC's ability to obtain relief.

The notion that malignant and fraudulent conspiracies are beyond equitable inquiry must be dispelled. The purposes of Title VII should not be allowed to "override" the public interest

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[1] Petitioner's Rule 28.1 lifting appears at p.i of its Petition.

[2] *See, e.g., EEOC* v. *Sears, Roebuck & Co.*, 24 Fair Empl. Prac. Cas. 325 (N.D. Ill. 1980).

in honest and impartial public servants. *See Berger* v. *United States,* 295 U.S. 78, 88 (1935).

Moreover, an administrator's prosecutorial discretion is not unbridled. If, as alleged here, the administrative process was tainted by fraud, judicial review is appropriate. Indeed, this Court recently stated as follows:

> In appropriate circumstances the Court has made clear that traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or otherwise contrary to law . . . . A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.

Marshall v. *Jerrico, Inc.,* 446 U.S. 238, 100 S.Ct. 1610, 1616-17 (1980).

Petitioner concedes that it has not yet established a claim of "unconstitutional prosecution" or prosecution which is otherwise contrary to law (Br. in Opp. 5). Its ability to establish such a claim has been thwarted by the Court of Appeals' overly restrictive construction of the Bank's equitable defenses and by its refusal to permit appropriate discovery.

Even assuming that the doctrine of recoupment is inapplicable to this action, this Court has recognized the inherent equitable powers of the federal courts to remedy EEOC misconduct. *Occidental Life Insurance Co.* v. *EEOC,* 432 U.S. 355 (1977). The Court would be unable to assess the effect of the misconduct where it has been deprived of the evidence.

Respondent's assertion that the *sole* remedy for a bad faith or vexatious prosecution by the Commission is the recovery of costs and attorneys' fees (Br. in Opp. 6), is untenable in view of this Court's holding in *Occidental Life.* Indeed, even if the recovery of attorneys' fees were Petitioner's only remedy, evidence that the EEOC had fraudulently procured a charge of discrimination would be probative on the issue of bad faith and vexatiousness.

Contrary to Respondent's suggestion (Br. in Opp. 6), the Court of Appeals did not determine that the information Petitioner sought was not discoverable under Fed.R.Civ.P. 26(b)(1). Nor did the Court of Appeals hold that disclosure of the Commission files was prohibited by Sections 706(b) and 709(e). This Court's decision in *EEOC* v. *Associated Dry Goods Corp.*, 49 LW 4149 (1981), is inapposite. *Associated Dry Goods* dealt with pre-litigation disclosure of EEOC files, not the discoverability of such files where there are well pled allegations of a fraudulent conspiracy between EEOC officials and a charging party.

Respectfully submitted,

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